

REVISED DRAFT

April 25, 1991

Dear :

This responds to your recent letter concerning the Environmental Protection Agency's possible designation of environmental tobacco smoke ("ETS") as a Group A carcinogen. [The specific issue you have raised concerns the impact such a designation may have on (name of company)'s current policies regarding smoking in the workplace.] We appreciate your contacting us for information on the subject.

The Environmental Protection Agency ("EPA") staff currently are revising three documents relating to ETS -- a Risk Assessment, a Workplace Policy Guide, and a Technical Compendium of issues on ETS. None of these documents has been completed or formally adopted by the Agency. A Science Advisory Board ("SAB") panel was convened in December 1990 to review the Risk Assessment and Policy Guide drafts and was highly critical of both documents. Substantial revisions to the drafts were called for by the SAB members.

Although a number of the SAB panel members tentatively endorsed the proposed designation of ETS as a Group A carcinogen,

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the panel members also emphasized that the issue of whether such a designation could be sustained would remain open until the further analyses called for by the panel have been completed. The SAB Panel also requested that the drafts be subjected to a second review after revisions in accordance with the panel's recommendations have been made. We continue to believe strongly that the proposed Group A classification of ETS is unjustified by the scientific studies that have been conducted to date. Further analyses, as called for by the SAB panel, should demonstrate the correctness of our position.

It now appears that the EPA staff will not be able to complete work on the ETS documents described above before the summer of 1991, at the earliest. Whatever the outcome of the EPA's deliberations, however, several points should be borne in mind as the EPA review continues.

First and foremost is the fact that EPA has no regulatory authority with respect to indoor air generally or ETS. In fact, Congress has considered proposals to give EPA regulatory authority with respect to indoor air issues and specifically declined to do so. The only federal agency that possesses general regulatory authority concerning indoor air in the workplace is the Occupational Safety and Health Administration ("OSHA").

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On at least two occasions during the past several years, OSHA has considered and rejected petitions to ban or severely restrict smoking in the workplace. In connection with the most recently completed proceeding, OSHA concluded that "the currently available data are not sufficiently definitive" to support such measures. (Letter from Assistant Secretary, Occupational Health and Safety Administration, U.S. Dept. of Labor, to John F. Banzhaf, III, Action on Smoking and Health (Sept. 1, 1989)).

In a November 30, 1990 letter, the Administrator of OSHA similarly informed Action on Smoking and Health (an anti-smoking group) that "OSHA is not prepared, at the present time, to initiate rulemaking on ETS, although a final decision whether and how, to proceed has not been reached." In December 1990, OSHA announced that it intended to issue -- sometime in the spring of 1991 -- a request for information covering a host of indoor air issues, including ETS. The options that would be available to OSHA thereafter range from the initiation of a regulatory proceeding on indoor air quality in general, which would perhaps include but would not be limited to ETS, to the reaffirmation of current OSHA policies, which do not include regulation of workplace smoking other than in connection with asbestos exposure. (See 29 C.F.R. § 1910 et seq., § 1926 et seq.).

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In addition, the EPA staff's initial effort to designate ETS as a Group A carcinogen was based largely upon epidemiologic studies focusing on the lung cancer incidence of nonsmoking women married to smokers. Scientists have pointed out in written comments to the EPA, however, that the slightly elevated incidence of lung cancer reported in a number of such studies has generally not reached statistical significance, and falls in most cases within the range of variation inherent in epidemiology. Three new studies on spousal smoking and lung cancer, which appeared in 1990, were not included in the EPA report. All three report no positive association for spousal smoking and lung cancer. When they are included in the EPA analyses, the overall risk estimate is not statistically significant. The available studies also include a number conducted on populations outside the United States, which raises questions about the validity of extrapolating from these studies to the United States population.

In addition, scientific submissions to the EPA have pointed out that the eleven studies that have included data on ETS in the workplace have not provided sufficient evidence for any conclusion regarding nonsmoker lung cancer associated with workplace smoking.

Finally, the proposed classification of ETS by the EPA would have only limited legal effect -- if it had any effect at

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all. OSHA has not enacted any general regulation pertaining to ETS. We are not aware of any other regulatory scheme or mechanism, either federal or state, that would be triggered directly by a Group A classification.

The treatment of workplace smoking under state workmen's compensation and common law theories is described in the article that is enclosed -- entitled "Smoking in the Workplace: Accommodating Diversity" -- which appeared in the July, 1989 edition of the Labor Law Journal and was reprinted in the Human Resources Yearbook: 1990 Edition. As pointed out by the author of that article, a leading labor law practitioner, neither the courts nor workmen's compensation tribunals have been particularly hospitable to efforts to interfere with workplace smoking policies that comply with applicable state and local statutes that are designed to accommodate fairly both smokers and nonsmokers. The article also describes in some detail an accommodation approach that has worked well for countless companies, large and small.

We hope that we have responded adequately to your request. Please feel free to let us know, however, should you need further elaboration of any of the points we have made.

Attachment

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